

A Briele

DECLARATION

FOR

What manner of speciall Nufance
concerning private dwelling Houses,
a man may have his remedy by Assise,
or other Action as the Case
requires.

Unfolded in the Arguments, and
opinions of foure famous Sages of the Com-
mon Law; together with the power, and extent of
customes in Cities, Townes, and Corporations, con-
cerning the same: together with the determi-
nation of the Law, concerning the commodity, and
use of Houses, and their appurtenances.

Whereunto is added,

*The Iustices of Afsise their opinion, concerning statute
Law for Parishes; and the power of Iustices of Peace,
Churchwardens, and Constables: and to know what they
are to do concerning Bastards borne in their Pa-
rishes, reliefe of the Poore, and providing for poore
children: what remedy for the same.*

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The Arguments and opinions of foure famous Sages of the Common Law, touching the power, and extent of customes. of Cities, Townes, Corporations, and Inheritances, together with the determination of the Law concerning the commodity, and use of Houses with their appurtenances, and wherein an action may be maintaineable concerning the same, and wherein not.



Man hath a House, and the Windows thereof open into another mans house, whether hee may builde a house, so as to stop up the same lights, or not: concerning which, I purpose to shew you my opinion, and likewise to shew unto you the necessity and use of Houses.

*Mr. Mou-
sons argu-
ment.*

The first, and chiefe use of an house is to defend man from the extremity of the winde, and weather. And by the receipt of comfortable light, and wholesome aire, into the same to preserve mans body in health.

Therefore whoso taketh from man so great a commodity, as that which preserveth mans health in his castle, or house, doth in a man-

manner as great wrong as if he desceifed him altogether of his Free-hold.

As if I have a Mill, and another will turne away the water running to the same, I may bring an Assise against him.

So, if I have a Pipe, which conveyeth water unto my house through the ground of another man, and he will cut my pipe, I shall have an action against him : In like manner who so stoppeth my light, is the cause that no ayre can enter into my house, without which no man can live, and a house lacking light, is rather a dungeon then a house.

If one who hath a horrible sicknesse be in my house, and will not depart, an action will lye against him, and yet he taketh not any ayre from me, but infecteth that which I have.

So if one cast filth neere unto my house, I may bring my action against him. If a man build so high that his house droppeth on my house, I shall have remedy against him.

And though light and ayre be common, yet if by any mans owne act they may bee made private, they may not then bee taken from him, and if they be, hee shall not be without remedy.

This appeareth by Hawkes, and Deere, which be *fera natura*, yet if by mans industry they are made tame, the owner will thereby gaine property in them : but peradventure it will bee said, The foyle is his owne, and it is *Damnnum*

absqz

absq; injuria, what then? though it be his owne, he must so use it, that hee hurt not his Neighbour.

As if a man had a Pond of water, and will suffer it to drowne his neighbours land, he shall have remedy against him.

If a man bee bound to reparaire the bankes of the sea that it drowne not the land adjoyning, and so doth not, but the land is drowned; an action lyeth against him. You may perhaps say there is plenty of light remayning, this notwithstanding our action will lye very well, for the taking away, or impayring part thereof. As an action was brought *quare arctavit*, & 2. H. 4. where a man had a way and another plowed the same, and it was thought there that an action would very well lye, and yet the way remained. If I have common in your Land, and you will plough part of the same Land, I shall very well maintaine an action against you. So it is of Common of Estovers, and piscary: and yet in all these cases, the whole is not gone, but some part remaineth. This proveth that though hee hath not stopped the whole light of the house, yet for that he hath stopped parcell, an action is very well maintainable, but if you had said, that on the same side there had beene plenty of light, it might have better stood with reason.

As touching your custome, whereby a man may stoppe his neighbours lights: I think this

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is rather *malus usus*, then any custome: for as I have learned of Mr. Hales, a custome is thus defined, *Consuetudo est ius non scriptum nunquam repugnans rationi naturali*, and therefore if any custome swerve from reason, and naturall equity, it is but *malus usus*, and for that to be abolished, for by entendment, and consideration of the law, and reason, every custome had a reasonable beginning, as that case in 35. H. 6. of selling Jewels in Cheape side may have a reasonable beginning. In like manner the custome of *Gavelkinde*, that Sons shall equally inherit the Lands of their Fathers. Such is the custome, that if a woman marry without licence, that she shall loose her dowry.

So is it also of the custome that one Towne may enter common with another. All these, and such like may well bee thought to have a reasonable beginning.

Otherwise it is, where by intendment their beginning cannot be thought reasonable.

As that a man shall pay reliefe, when that he shall marry his daughter. And as the custome is in Mich. 35. H. 6. fol. 31. of the pledging of goods: So it is of the custome, to arrest a man before the day of payment. In like sort in 2. H. 4. that the tenant shall not put his beasts into the Common, before the Lord hath put in his, which peradventure he will never doe, so it is 10. H. 6. If the Mayor of a Towne will prescribe to impound all beasts which shall be dammage

damage felonet in his owne pound, and there to keepe them till he be satisfied as he list, or if he prescribe to use, and occupy the same beasts howsoever he pleaseth.

In 2. R. 3. and 22. E. 4. one demanded whether it were a good custome, that if the Mayor of a towne suspect a man, that he may arrest and imprison him 3. dayes : this was thought no good custome, but to be most abhorring, and dissonant from reason. And therefore forasmuch as houses be necessary, and cannot bee without light and ayre, their beginning was lawfull, necessary, and reasonable, but that a man might stoppe up his neighbours lights, was never necessary, neyther had lawfull, or reasonable beginning, neither had any time obtained the force of a law, or custome, for in *K. Hen.* the 2. his time, it was but a constitution in *London*, and not any custome, and law, & therefore never allowed or confirmed in Parliament, for *Magna Charta* Ca. 9. did confirme such old liberties and customes as *London* had at that time: And therefore, if this were not any law or custome at the time of the making of that statute, it neither was nor could be confirmed by the same, for the more generall Statutes shall have a reasonable construction. As the Statute that doth prohibite maintenance, shall have a construction, for lawfull maintenance is not thereby prohibited. The like law is that where it is said, that a fine shall bee a Barre to a *feme covert*,

coverte; this is to be understood of a good, and lawfull fine, so this confirmation by Parliament of customes, and liberties of London, shall bee intended a confirmation of all their good, and lawfull customes, and not of unreasonable, or wrongfull usage, such as in 27. H. 6. if the house of tenant for terme of yeeres decay, that then he shall pay no rent, &c. But if your custome were then good, and so confirmed by Parliament, yet the words thereof may not be stretched to our case, the words are *visus fenestrarum*, and the Civill Law saith, a man may *estop visum*, & not *lumen*, *lumen est descendens de caelo*, *visus est meus prospectus ad terram*.

And our Law saith, *petit visum terra*, and *visus* and *lumen* differ. But Sir you cannot in this case defend your selfe both by the Common law and custome too. For you ought absolutely to trust to the one of them, and if you had plead thus by way of Bar, your plea without all doubt would have beene double.

As if a man will pleade affeasement with warrenty, and rely not on the warrenty, this plea is double. So in the case at the Barre, you plead both the common Law, and the custome, and your plea is double, and therefore for all these causes I thinke the plaintiffe ought to recover.

Mr. Plowden.

Mr. Plowden's argument.

Albeit it hath beene alledged, that the windows

dowes have beene time out of memory there, and the lights ancient, it is all one, as if the house had beene built at this day. Put the case there is a pale betwixt your ground and mine, and you build to the uttermost part of mine, by your first building I am bridled and stopt of my building; And in the Country who so maketh a hedge, will make a dike in the uttermost part upon his owne land. So hee that maketh a Parke, will leave ground out of the same compasse without the pale for the Keeper to walke about it, for there he may better heare if any body bee there within, then if he were within himselfe. And this is called free-bownd. If a man build his house so high that it droppeth on mine, an action will very well lye, for there is a manifest hurt, and wrong done unto me: but 2. H. 6. where the *Prior of St. Edees* had three Mills, and other man built another by them, he could not have any remedy for this. But if any of his tenants which held of him by grinding at his Mill grinde at the new Mill, the *Prior* may have an action against him, for he whose the land is, might use the same for his greatest commodity, and gaine.

If a man cut downe Trees which fall upon an other mans land, he shall have his action; otherwise it is, if a Tree fall by reason of winde. So in our case: of our owne soyle we may make the best, as in 12. H. 8. a man had a pond, and let the same runne out, whereby the next dwellers

land was drowned, this was but *damnum absq;
injuria*, wherefore no action would lie. In 4. E. 3
a man had a Lime-kilne, which destroyed the
Fruit of his neighbour, who maintained his
action, for in that case this taketh place, *Sic utero
tuo, ut alienum non laedas*; And Mr. Rastall saith
in his booke, if a man have a Dye-house, and
the water which runneth to his house, killeth
the Fish of another, an action lyeth. If a man
cast filth under my walls, I may punish him for
it. And in the 46. E. 3. The Prior of *Buckhurst*
had a sluice, whereby Salmons came in, and one
stopped the same, wherefore he had his action.
Like whereas one cutteth away the water,
which runneth to my mill, for the prooffe where
of Mr. *Raynolds* put a case out of 19. E. 3. where
an Affise was brought for two things, one be-
cause he had levied a house to stoppe the light;
another, because he could not repaire the same:
There it was thought that no action would lye,
because he might have remedied this in the be-
ginning when he built his house. And the case
was in 7. *Edw.* 3. in the last point, and there the
Lawyer sayd, that hee might have left space
enough in his owne Land, and the party was
non-suted. *Hermoods* report hath two verses,

*Sape recordare si debes aedificare
ut poteris stare cum eam vis reparare.*

But you ayde your selfe with a prescription
that

that you have had light time out of minde, this is no good prescription, for a prescription must be against some party. But this is against God; You say further, that the other had no house, which is not good; for a prescription must be in the affirmative, and this is in the negative, and so sayth *Prisot* in 22. H. 6. that a man cannot prescribe in the not having a house. But admitting it to be the usage.

An usage is generall, and a constitution speciall in 12. E. 4. A diversity is taken betweene usage, and custome; for that a custome is a thing disagreeing from the Common law, but not contrary, and also it would not be beautifull that Cities should have any voyd places in them, and it would be most honourable that they should be populous. And therefore was there a Statute made 27. H. 8. *ca. primo*, that there should not be any voyd places in diverse Cities, also houses are necessary for the sustenance of man, in 12. E. 4. there is a custome that if a man plough his Land, he might turne his plough upon another mans land: and this was thought a good custome for the favour of Tillage, much more our case of Building is to be favoured. 8. E. 4. the custome is, that a Fish-man may drive stakes into another mans ground to dry his Nets, which was allowed for a very good custome. Likewise 15. E. 2. one prescribed that when the Hay was carryed out of a certaine medow, that hee should occupie the land unill our Lady day, which was allowed by the Court. So a man

may prescribe to have Common of fflowes in another mans land, and to cut them down himselfe. The Lord in ancient demesne prescribed, that if the vallaine of another Lord remained a yeere and a day in ancient demesne, that then it shall not be lawfull for his Lord to take him from thence. In like manner, one may prescribe to have gravell in my Land, and all these customs stand very well with reason. If I have a way, and another man plow up the same, I cannot have an action on my case, but I must have an Assise and so is the booke in 2. H. 4. M. Fleetwood saith that all customs must stand with reason. And in 5. E. 4. it is sayd, that albeit all customs are confirmed, yet they must be examined, by the rule of reason, as the custome of *Gavelkinde* standeth with reason. The Statute that giveth a writ of ravishment *de Gurd to Gwarden* in foccage shall be extended to the Mayor, and Aldermen of *London*, to give them like remedy which was confirmed by 1. E. 3. Also the Statute that no man shall give lands in Mortmaine, yet Citizens and Breemen of *London* may give lands in Mortmaine by their custom, which custome is also confirmed by act of Parliament. As for the doublenesse of the plea I will not say any thing, for that it is not any Iustification, but onely for to diminish the damages, if perhaps it bee found against us. And therefore upon the whole matter, I thinke the plaintiffe ought not to recover in this action. I thinke the contrary, and first I will consider these foure things.

First,

First, whether such buildings, *ex opposito*, be a nuisance by the Common law. *2 H. 6. 19.* Mr. Wrayes Argument.

Secondly, whether this custome bee a good custome.

Thirdly, whether such kinde of buildings be for the beautifying of the City.

Fourthly, whether the said confirmation by Parliament make this custome good, or not.

As touching the first matter, the nuisance which is supposed to be in stopping up of windows in the South part of an house, I conceive is a nuisance by the Common law, for by the Common law, one shall not hurt the Freehold of another, and no greater hurt, grievance, or damage can bee done to any mans Freehold, than to take away the light and ayre thereof, which is comfortable, & commodious for him; for when this light, and ayre are taken from him, his house remaineth as a dungeon. And diverse cases there bee where a man taketh away from another not the thing it selfe, but the commodity of the thing, and for that he shall have his remedy by action: as if I have a water running through your ground unto my Mill; and you will turne away the course thereof, or stoppe the same; I may being an assise *9. Ez. 1. 19.* yet I will confess, that if an other build a Mill by my Mill, I may not have any action, *2. H. 6.* for it is *damnum absque injuria*. So it is in *2. H. 4.* in the case of the Schoole *studens ratio*. But if any bought the ground at my

Mill, and another will hinder them, an action lyeth, 9.H.6. *vs.* 43. where the Pryor of St. Barthol. had a Faire, and one interrupted the commers thereto, whereby his Toll was impaired, and yet not his Faire, but the profit of his Fayre taken away, and he had remedy. So in our case he hath not medled with our Freehold, and yet hee hath hurt our Freehold. So in 4. E.2. 13 E.3. If I have a Faire, and the King will grant another, if my Fayre bee impaired by this I shall have an action, and so of a Ferry, and the reason is, because a man is compellable to maintaine his Fayre, Ferry, or market, and if hee doe not, it is punishable in a Leete. But of a Schoole, otherwise it is, for that a man is not bound to maintaine it, but Houses and Cities men are bound to maintaine, and that by Statute, otherwise they may incur the punishment. 18 E.3. one built his house so high over mine, that the raine dropped from his upon mine, and it was thought there that an action was maintainable, yet that hurt might have been amended *fortiori* in our case where the hurt is perpetual and cannot be amended. And if for a way an action lyeth, as it is in the 22. E.3 much more for a hurt to our health, which above all things men should regard unto, for the peace whereof we have writen the Register *de preser. am. emend.* Like wise the selling or corrupting of votes, whereby mens bodies may sustaine harmes, is punishable in a Leete, which proveth that

that the Common law hath regard unto the health, and welfare of every private man. There is a case in 4. E. 3. lib. ass. pt. 3. where one built a Lime kilne, and his neighbour was annoyed by the smoke thereof, and had his remedy. If a man shall be punished for smoke, which may be avoyded, and dureth. But at times, what shal wee thinke of the taking away of light, and ayre, which cannot be amended, but remaineth a continuall and perpetuall nuisance, as for the cases in 19. E. 3. which hath bin avouched so oft so make strongly against us, I take them to be one case, for so much as the Iustices which speake in one place, speake also in the other place, and last of all in both cases, the case was thus, an assise of nuisance was brought, and the Plaintiffe counted how the Defendant had levied a house, so that thereby his light was stopped up, and that he could not so well come to his house as he did before, also that he could not repaire his house so well as he could before.

Here he said, as to the light be it a nuisance, such a one as it is *Tiel. quel.* for the repairing none, for when a man buildeth, hee must leave so much space on his owne ground that hee may come to repaire his house, and if he had thought that stopping of his light had bin no nuisance he wold not have said, be it a nuisance *Tiel. quel.* but have said as he did to the other case of repaying, it is no nuisance. And therefore for the first matter, I thinke this to be a nuisance by the Common law.

As

As touching the second matter, whether this custome be a good custome or not, and I thinke the same is no good custome: For *consuetudo est in. &c. ut supra*, a custome is not against law, and reason, but this custome of yours is against reason, and is in effect, as if a man should take my life from me, for these bee the instruments to maintaine, and preserve mans life, and the law saith, *sic uter et tuo, ut alienum non laedas*, therefore a custome against this precept, is *malus usus*, and therefore *abolendus*, as the case in 21. E. 4. If the Kings Bayliffe or any other Bayliffe distraine Cattell, and bring them to the Lords Pound, and if the owner did not within three dayes agree with the Lord, that then he should loose his Cattell, this was thought unreasonable and not allowed for any good custome. So in 9. H. 6. where there the Lord of a Lect would have prescribed to have all the waste ground, but he could not, because it was against reason, that he who had nothing in the land should have the wafts. Like unto the said case in the 35. H. 6 fo. 31. of pledging of goods and such is that case in 43. E. 3. where the Lord of the Māner would have prescribed, that none of his tenants should marry their daughters without his licence, this custome was thought to bee against all equity, and reason. In 13. E. 3. in a *dum fuit infra etatem*, one would have prescribed, that if the Plaintiffe could number 12d. he might *alien* his land by the custome: this is not a reasonable custome,

for

for a man may be able to number 12d. and yet not have discretion enough to alien his Land: So it is likewise against naturall reason, that one should barre me of my light, and ayre, without which I cannot live, and therefore these things be of necessity. Also it is against the Law that one should meddle with the Freehold of another man, unlesse it be for a Common-wealth, as 8. E.4. where one justified the setting in of stakes for to dry his nets, and likewise in the 11. H.2. where one brought an action for taking or driving his Hogges, the Defendant justified, because the custome of the City was, that if any mans Hogges came into the City, and upon warning given to the owners to keepe them out; if they came againe, that then they shall be forfeited. This is a reasonable custome, because Swine are beasts that may cause diseases to bee in a City, and therefore it is against the Common-wealth, in 22. E.4. Where it is sayd, that a man may turne his plow upon another mans land, that is a good custome, for by this meanes no land shall be unfowne, which is for the maintenance of Tillage, and the benefit of the Common wealth. But this your custome is but a private custome, and not for the maintenance of the Common-wealth, and therefore is like unto the custome in 43. E.3. that if the tenant cease to doe his custome, the Lord may enter, this custome standeth not with the Common law, neither with the Statute which put-

teth the Lord to his *cessavit*, and giveth him not
 any entry. So it is to be thought of the custome
 in 2. H. 4. that the Tenants shall not put their
 beasts into the Common before the Lord hath
 put in his, which peradventure he will never do,
 so that the Tenants shall never have their Com-
 mon. So it is if a man prescribe that the ali-
 enation of the Husband of the Lands of his
 Wife shall be good without examination of
 her. Like law of the custome in 43. E. 3. that
 if any goods be wayned in any manner, and if
 any man take them, that then it shall be law-
 full for mee to distraine, and detaine the di-
 stress till such time as I am satisfied: by these
 cases rehearsed it is manifest and cleare, that all
 usages against naturall reason, and the Com-
 mon law of this Realme, are not customes, but
 evill usages, and not to be allowed. So in our
 case a custome to take away a mans light, and
 ayre, preservers of health, must needs be *malus*
usus, and therefore ought to be taken away;
 For good usages stand with reason, and as
Bracton saith, must give place to reason and law.
 But you will say, that the law of your City is
 such: I say if it stand not with reason and law,
 it shall not be allowed. As 10. E. 3. in an ap-
 peale brought by a Cittizen, the Defendant
 waged battaile, this Cittizen said the custome of
London is such, that a stranger should not wage
 battaile against a Citizen, this was thought no
 good custome, nor sufficient to deprive a man
 of

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of a benefit, which the law giveth him. And so
in 27. H. 6. in an action of debt upon a lease for
yeeres, the defendant sayd that the custome
was, that the plaintiffe should repayre the hou-
ses, and if not, that the defendant should pay
no rent, this was thought to bee no custome
allowable. For the third point, this is no beauti-
fying at all to the City. In our case Mr. Hayles his
house is an ancient house, and therefore a-
gainst reason that by later building, the com-
modity, and use of the same should bee taken
away. You say also that it is a thing honourable
to have buildings in Cities; This I grant, and
I thinke no man will deny it: but by building
of one, to impaire a better house, this is not
any beautifying, or honour at all to a City, but
rather the contrary. For the fourth matter, if
the custome be not good, the confirmation can-
not make it good: for as I take the law, the
common learning is, that a confirmation cannot
make a voyd thing good: as for a confirmation
*est firmum facere id quod non firmum fuit ante, sed
fuit tamen*, 26. H. 8. If an Infant grant an advou-
son, and at his full age confirmeth the same, by
this confirmation nothing is wrought. So it is
in the case of 33. E. 3. where the lease for yeeres
was made by a Bishop, and he dyed before the
yeeres expired, the successour confirmeth the
said lease, and *nihil operatur*. Likewise in 39. H.
6. the King granted an advouson to one, and
after granted the Mannor with the advouson to

another; and after the confirmation is made, yet the advowson passeth not. But where the Statute limiteth that men may devise unto corporations in Mortmaine, yet if they will devise to any that is not a Corporation, it is without warrant: And also albeit a man may not wage his law in London, yet if at the Common law, an action be brought against him, hee may: So it is of the case in 20. H. 6. that if one be brought before the Sheriffe, that the Mayor may dismisse him, yet after judgement hee may not dismisse him.

Likewise 12. E. 4. where one would have prescribed to buy things without paying of tolle, that he could not be allowed. And therefore I will conclude that such customes as stand with law, and reason, are to be allowed, and contrary such as swerve from the rules of law, and reason, to be disallowed. As this custome of yours, that a man should stop his neighbours lights is altogether unlawfull, and unreasonable, and therefore the plaintiffe ought not thereby to be barred of his action.

Mr. Manwood.

Mr. Man-
woods Ar-
gument.

Here bee two matters chiefly to be considered, whether by the Common law this bee a nuisance, to stop up part of a mans light, then if the Common law seeme to be doubtful, whether the custome will helpe us, or not, divers cases

cases have beene put, when a man toucheth
 not the Free-hold of another, but on his owne
 land doth wrong unto another mans. But all
 these cases doe vary from our case, for they are
 where a man hath a private profit in a thing, and
 another by doing an act upon his owne land
 taketh away the same, wherefore an action will
 lie, as the case in 46. *Edw. 3.* where the Abbot of
Buckburst had Salmons, comming in at a sluice
 from the Sea, and a stranger stopped the same,
 so that they could not come, and hee had his
 action. So it is where one taketh away my way,
 because this is a thing locall. And so if water
 running to my Mill, if one miscarry the same:
 generally wheresoever I have a private profit,
 or interest, and one barre me of the same, it is
 injury: but the ayre is not any element locall,
 neyther may any man miscarry it, for it suffe-
 reth nothing to be voyd, also light, and ayre bee
 not things of necessity, but of pleasure, and bee
 not any profit in *certaino loco*, and therefore not
 like unto other cases of things both profitable,
 and also necessary. The case of the Ferry I will
 grant, that if I have a Ferry to transport men,
 and another will erect another I shall have an
 action, because that I am compellable to main-
 taine it, and the not keeping of it, is present-
 able in a Leete. The same law is of the Market,
 where the King granteth another Market *ad*
monumentum of mine, I may have a *scire facias* to
 repeale his letters patents if he have these words.

in them, that the grant should not bee to the hurt, or prejudice of any other market; and if not, I shall have an action on my case: your case was also compared to the case in 4. E. 3. and 4. *ass. pla. 3.* where the *ass.* was maintained, not for that the plaintiffe was annoyed by the smell of the smoke, but because his Apple-trees, and other his fruits were destroyed by the same, & this is a good reason, for that it is to his disinherittance. As for the case of the Lime-house at *Ratcliffe*, and the smoke of Smiths houses which cast many unsavory smels, it is *damnum absq; injuria*. And I my selfe was by a Smith annoyed by the smell of his smoke, but yet might I not have any action against him. In 18. *Edw. 3.* one built an house so high that it dropped from his to mine, in this case an action will lye, for my tyles are thereby consumed, *gutta cavat lapidem*. So of the case in 2. H. 5. if by common assent our houses joyne and a gutter is made betwixt us, if I plucke up my part, you may maintaine an action against mee. All these cases hitherto put, have beene of taking away a local commodity, or else of consuming something.

The case of the filth I finde not in my booke, but in the booke of Entries, and there it was *Berparistes*, so that the wals were hurt thereby. But I will agree with you, that if all your windows were stopped, that an action will lie, and where you say, *sic utere tuo ut alienum non laedas*,

this

this is not meant of things of pleasure, but of things of profit. And here is not any part of your house consumed, but herein a let of your pleasure onely, for which your action is not maintainable. And if I have a Windmill, and another will build another by mine. I cannot have any action against him. 11. H. 4. 7. E. 3. 22. H. 6. But otherwise it is of a Watermillne, 9. *as far. pla. 19.* where one had a Watermill, and another built neere unto him, so that hee could not grinde so much as he was wont, in this case a man may very well maintaine his action. If I have an Inne, and another set another in the same Towne, hee is not punishable, but if hee will stop my guesse, which come to my house, I shall have remedy. If I have a Brew-house, and another build another by mine, I shall have no action. 12. H. 8. If water fall on my land, and I make a Sluice, and let it out of my land unto another mans; this is dispunishable, for every man may doe this one after another untill it come unto the River, but if it be a river, otherwise it is; For there it is in *loco certo*. If one house should not bee adjoyning unto another, it would bee a great deformity, and if *Cheapside* were so built, it would be a strange *Cheapside*. And the Civill lawes say, that two lights on the former part, and backe of an house, are sufficient. And if you make your windowes into our garden, this is a wrong done unto us, for by this meanes I cannot talke with my friends

in my Garden but your servant may see what I doe, and so the wrong first begun in Mr. *Hales*. And therefore *Vim vi repellere licet*. And *I. S.* hath not consumed, or hurt any part of his house, but interrupted him of his pleasure only. But I further affirme, that for every hurt a man may not have an action; but if a man bee oftentimes hurt, he may very well have an action. As if the Lord distraineth for rent, an action lyeth not; but if he distraine so oft, that I cannot plow my land, I shall have an assise. So the Kings grant of exemption to one is good, but if it be to diverse, it is not good. But if the Common law would not helpe us, yet custome will, & whereas it hath beene sayd, that it is against naturall reason, and law, it is not so, *Consuetudo ex rationabili causa privatur communem legem*; and unlesse it do *privare communem legem*, it is no custome. As that an Infant of 15 yeares age, may alien. For at this age he may consent to marriage, therefore in as great reason may he alien his lands; & in some places any Infant of 9 yeares may binde himselfe apprentice, which is a good custome and standeth with reason. But some customes these are that be not good. As that the tennants shall not drive their beasts into the Common before the Lord hath put in his. So if the lessee will prescribe to surrender at his will, 7.H.6. otherwise it is of the custome in the 14. H.4. that the Tennant shall not alien without the presentment of the same before, this is a good custome

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custome, and yet against common reason, but
yet if it hath any taste or smatch of reason, it
shall be allowed. As if the Lord prescribe that
the tenant shall not common with any beasts,
but those which were bred on the same land.
this is good, for this will cause the tennant to
breed Cattell; likewise that a *feme sole Mer-*
chante shall sue without her husband, this is
good, and yet against Common law, and reason,
because the husband hereby is discharged of all
such businesse: therefore if a custome have any
part of reason, it shall be allowed. As 8. E. 3. that
a man may make an estate to his wife during her
life, and that should bee as good as an endow-
ment *ad ostium ecclesie*. So it is of the custome
of the Isle of man, that to steale a Capon, or
a Pigge, shall bee Felony, and not to steale a
Horse, or Cow, for that the one may bee
hid, the other may not. Likewise is it, that
the youngest sonne shall inherit, because he is
lesse able to helpe himselfe. So is it of the cu-
stome of *Kent*, The Father to the bough, the
sonne to the plow, and yet directly against the
Common law. So I thinke of the case of Hogs
put by Mr. *Wray*, for that in the time of pesti-
lence it is dangerous to let them come into
Cities.

This City is the greatest City, and most po-
pulous in this Realme, and the more populous
the more honourable, & the more buildings, the
more populous and honourable will it be. And

E

there-

therefore Buildings is to be favoured. And by this building all his light is not stopped, but parcell. And Mr. *Hales* thereby looſeth no not any great commodity, but is restrained of a little pleasure, for which he cannot maintaine his action.

To the act of Parliament I will ſpeake nothing, but this I will ſay, that if any cuſtome be meereſly voyd of reaſon, it is not good. As the cuſtome in 5. H. 7. that if the Lord diſtraine the beaſts of his tenants for rent, that hee may detaine them untill hee bee ſatiſfied at his pleaſure; and 21. H. 7. that if any doe breake the Pound he ſhall pay 3 l. this is a voyd, and unreaſonable cuſtome to binde an eſtranger, and yet by common conſent of the Lord, and tenants, it is good to binde the tenants.

So if I preſcribe, that if any mans Sheepe goe on my ground all the day, to have the foldage of them in the night, is a good cuſtome, becauſe by common entendment the owner hath *quid pro quo*. So our cuſtome is for the maintenance of the City, neither is it againſt the common law directly, neither hereby any offence, or hurt is done unto Mr. *Hales*, for his houſe is not thereby impayred. And therefore, I thinke his action will not lye.

Finis de ceux Arguments.

RESQ.



Resolutions of the Judges of Assises,

1633.

I. Question.



Hether the Church-wardens and Over-seers of the poore of a parish with assent of two Iustices of the Peace, one beeing of the Quorum, may by the Statute of 43.

Elizabeth, cap. 2 or any law enforce a Parishioner of the same Parish to take a child of a poore parishioner of the same Parish, who is not able to keepe his sayd childe, to bee an apprentice?

Resol. The Statute of 43. of *Elizabeth*, which sayth, that the Church-wardens and Over-seers of the parish shall put out Children to bee apprentices, necessarily implyeth, that such as are fit must receive Apprentices, and the putting out of poore children to bee apprentices is one

of the best wayes for the providing for the poore.

2. Q. If they may, then whether they must not give money with him, and who shall determine what money shall be given with him, if the party that is to take such an apprentice, and the Church-wardens, and Overseers cannot agree thereupon?

Resol. There is no necessity that money must be given, but that must be left to the discretion of the Church-wardens, and Overseers, all circumstances of age and ability, being considered, and if they cannot agree with the party, then the Iustices of Peace neere adjoyning, or in their default the Sessions of peace are to determine these Controversies.

3. Q. Whether a Knight, Gentleman, Clergy-man, or Yeoman, or one that is Sojourner, using husbandry, cloathing, or grasing, or the like, may be enforced to take such an apprentice?

Resol. Every man who is by calling or profession or manner of living, that entertaineth, and must have the use of other servants of the like quality, must entertaine such apprentices, wherein discretion must be given upon due consideration of circumstances.

4. Q. Whether a wealthy man keeping few or no servants, nor wanting a servant, but living

ving privately may bee enforced to take such an apprentice; if not, then whether he may be taxed towards the putting forth of such an apprentice?

Resol. For the receiving of such apprentices, the answer may bee referred to the question next before; but out of doubt every such person must contribute to the charge, as to other charges for the provision for the poore.

5. Q. Whether they may enforce a parishioner that is of one parish, to take such a child, apprentice, that is of another parish, but within the same County or division, if the proper parish be not able to provide for the children of the same parish?

Resol. The Iustices may provide Masters for them in other parishes within the same hundred; if the same hundred be not able, then out of that hundred in the rest of that County; As for other provision for the poore, which must bee at a quarter Sessions.

6. Q. If such a Parishioner may be enforced to take such an apprentice, and shall refuse not onely to take such an apprentice, but also refuse to be bound to appeare at the next quarter Sessions, or Assizes, what shall be done to him?

Resol. If any refuse; let such a one be bound over to the next Sessions or Assizes; if hee refuse to give such bond, let him bee sent to

the Gaole, there to remaine untill hee will give such bond.

7. Q. If such a Parishioner who refuseth to take such an apprentice shall bee bound over to the Sessions for not taking such an apprentice, and when he appeareth there, shall likewise refuse, what shall be done to him, and what shall bee done to the Parents who refuse to suffer their Children to be put out to bee apprentices, themselves not being able to maintaine them?

Resol. If at the Sessions or Assizes such a one refuseth to take an apprentice, and his excuse be not allowed, it is fit he bee bound to the good behaviour, and it will be a good course to indict such a refuser for a contempt, and thereupon to fine and imprison him, if he refuse to be bound to the good behaviour, let him bee imprisoned untill hee will; and the Kings booke of orders directs that such be bound with good surties to appeare at the Councell board; and if the Parents of such poore children refuse to suffer their children to be bound apprentices, or being bound, entice them away, themselves not being able to maintaine them, let them be committed to the house of correction.

8. Q. Whether it bee in the power of any generall quarter Sessions to mitigate any penalty upon a Statute law; if the party indicted shall submit himselfe to the fine of the Court, and wave the traverse?

Resol.

Resol. If the party bee convicted or confesse the fault, it is not in the power of the Court to mitigate the fine, in such cases where the Statute makes it certaine : but if the party indicted protesting his Innocency, yet *quia noluit plitare cum domino Rege* puts himselfe up into the grace of the Court, the Court may impose a moderate fine, and order to forbear the prosecution.

9. Q. If any be bound to appeare at the Sessions, and shall tender submission to the Court, whether the Sessions may sta^e the indictment, and mitigate the fine, aforesayd upon the confession of the fact?

Resol. This is answered before to the next precedent Article.

10. Q. If a man be convicted for being drunk, tipling, and keeping an unlicensed Alehouse, or being licensed, for suffering others to remaine tipling in his house, or for swearing or driving Cattell upon a Sunday contrary to the Statute in that case provided ; whether the Iustice of Peace, before whom hee was convicted, or any other Iustice of the Peate may discharge him of all or part of the Forfeiture or punishment appointed by the Statute?

Resol. The Iustices have no such power of mitigation after conviction, where the Statute appoynts the measure of the punishment.

II. Q.

11. Qu. Whether a Constable may upon a Warrant for carrying one to the house of correction for keeping an unlicenced Alehouse upon the second conviction breake open the house wherein the party convicted is, to apprehend him?

Resol. This question is to bee advised upon, it is put in generall termes and referred to bee considered in the particular where it appeareth.

12. Qu. If a woman unmarried be hired from weeke to weeke, or from halfe yeare to halfe yeare, in one Parish, and there be gotten with child, and then goeth from thence unto another parish, where she is settled in service by the space of two or three months, and then discovered that she is with childe: The question is, whether she shall bee settled in the Parish where she was begotten with child, or in the Parish where shee was last settled?

Resol. The place where, such a woman was lawfully settled, is the direction in this case, not where she was begotten with child.

13. Qu. If a woman servant unmarried bee begotten with child, and then goeth out of her Mistresse service, before or after it is discovered that she is with child, and the reputed father bee runne away, or is not able to free the Parish: whether the Master may bee enforced to provide for her till shee bee delivered, and for a moneth after?

Resol.

Resol. If the Master hath legally discharged his house of such a servant, hee is no more bound to provide for her than any other.

14. *Qu.* In case a Parish consist part of ancient *Demeasne*, and part of *Guildable*, an Affize is made for the reliefe of the maimed Souldiers, the Gaole, &c, according to the Statute of 24. *Elizabeth*, cap. 2. whether the tennants in ancient demesne shall contribute with the Guildable for the payment of the Affize?

Resol. The Statute doth not distinguish between the ancient *Demeasne* and the *Guildable* in these cases, *ubi lex non distinguitur, ibi nec nos distinguimus.*

15. *Q.* Whether an Indictment of forceable detainer bee within the Statute of 1. *Iacobi*, cap. 5, and not to bee removed by *Certiorari*, unless the party Indicted first finde sureties according to that Statute, and whether the party Indicted bee to be bound in his absence to prosecute according to that Statute, and whether an Indictment of forcible entry &c. found at a private Sessions bee to bee removed by *Certiorari* without sureties, according to that Statute?

Resol. This is fittest to be left unto the Court of Kings-bench, to whose Commission, and jurisdiction this is most proper.

16. *Q.* If one bee convicted upon the Statute of 3. *Car. R.* cap. 13. for driving of Cattell

on the Sunday through severall parishes; whether hee shall forfeit 20 s. to every of the sayd parishes; or onely to one; if to one, then to which of them?

Resol. This Statute giveth the Forfeiture but of one 20.s. for one Sabbath day. Although the driving of that day bee through divers parishes. Therefore where the action is first attached, and the distresse first taken, that parish shall have the benefit of the Forfeiture, and not the other.

17. Qu. If one who is under the age of 30. yeeres, and brought up in husbandry, or a mayd-servant, or brought up in any of the Arts or trades mentioned in the Statute of 5. *Elizab.* c.4. and not enabled according to that Statute, to live at his or her owne hand, shall be warned by two Iustices of the Peace to put him or her selfe in service by a day prescribed by them, and shall not doe the same accordingly, but shall after continue living at his or her owne hand, what course shall bee taken with such a person, and how punished?

Resol. Such persons being out of service, and not having visible meanes of their owne, to maintaine themselves without their labour, and refusing to serve as an hyred servant, by the yeere, may be bound over to the next Sessions or Assizes, and to bee of the good behaviour in the meane time; or may be sent to the house of correction.

18. Qu. Whether the tax for the reliefe of the poore, upon the Statute of 43. *Elizabeth*, shall bee made by ability or occupation of lands, or both, and whether the visible ability in the parish where hee lives, or generall ability wheresoever, and whether his rent received, within the parish where hee lives shall bee accompted visible ability, and whether hee shall bee taxed of them onely and for any Rents received from other Parishioners; and what shall bee sayd visible ability?

Resol. The Land within each parish is to be taxed to the charges in the first place equally and indifferently, but there may bee an addition for the personall visible ability of the parishioner within that parish according to good discretion, wherein if there bee any mistaking, the Sessions, &c, or the Iustice must judge betweene them.

19. Qu. Whether shops, salt-pits, sheds, profits of a Market, &c. be taxable to the poore as well as lands, Cole mynes, &c. expressed in the Statute 43. *Elizabeth*?

Resol. All things which are reall, and a yeerely revenue, must be taxed to the poore.

20. Q1. Whether the tax for the County stocke, Gaole, and house of Correction is to bee made by the Statute of 14. *Elizabeth*, cap. 43. *Elizabeth*: by ability, and upon the inhabitants of the parish onely, or upon them

them, or the occupiers of Lands, dwelling in that parish: or whether such as occupie lands in that parish, and dwell in another parish shall bee taxed?

Resol. If the Statute in particular cases give no speciall direction, it is good discretion to go according to the rate of taxation for the poore: but when the Statutes themselves give directions, follow that.

21. Q. Whether any taxes ought to be made for the charges that petty Constables and Borshoulders are at in conveying rogues from parish to parish, and relieving of them, and how to be rated?

Resol. It is fit to relieve the Constable and Tything men, in such sort as it hath beene used in the severall places where they live.

22. Qu. Whether a Iustice of Peace may discharge a servant being with childe from her service, allowing that as a reasonable cause that she is thereby made unable to doe the service which otherwise she might have done, and if hee may discharge her, whether that Parish shall provide for her, till her delivery, if shee cannot provide for herselfe; and so also if her time be expired before her delivery, who shall provide for her after her time ended?

Resol. If a woman being with childe procure herselfe to bee retayned with a Master who knoweth nothing thereof, is a good cause to discharge her from his service. And if shee bee

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begotten with childe during her service, it is al
one, but the Master in neither case must turne
away such a servant of his owne authority. But
if her terme be ended, or shee lawfully dischar-
ged; the Master is not bound to provide for her,
but it is a misfortune false upon the parish, which
they must beare, as in other cases of casuall im-
potency.

23. *Qu.* Whether being delivered of a ba-
stard childe in one parish, and goeth into ano-
ther with her child; and becomes vagrant, and
so is sent to the place of her birth: her bastard
childe being under the age of seven yeeres, shall
be settled with the mother, and there maintained
if the mother bee not able, nor the reputed Fa-
ther knowne, found: or whether it shall be sent
to the place of its birth, or being settled with the
mother, whether the Parish where it was borne,
shall be ordered by the two next Iustices to pay
a weekly summe towards the mainetenance of
it?

Resol. The Bastard child must be placed with
the mother, so long as it is within the quality or
condition of a Nurse childe, which shall be, till
seven yeeres of age; and then it is fit to be sent
to the place of its birth to be provided for, the
mother or reputed father, not being able. And
the Parish where the childe is borne shall not be
forced to contribute to the charge, as long as the
Mother lives, and the child be under seven yeere
old.

24. Qu. A man with his wife and children takes an house in one parish, for a yeere: and before the end of his terme is unlawfully put out of possession, and after taketh part of an house, as an Inmate in another parish, from whence hee is also put out, and then not being able to get any dwelling, they come to lye in a Barne in a third parish where the husband falleth sicke, and the Wife is delivered of another childe, where ought these to be settled?

Resol. If a man or woman having house or habitation in one parish bee thrust out, this is an illegall unsettling which the Law forbiddeth, for none must bee enforced to turne vagrant, and such one must bee returned to the place where hee or shee was last lawfully settled, and the Childe also borne in the time of this distraction.

25. Qu. Whether an apprentice put out by the Churchwardens, &c. according to the Statute to a Master in another parish, if his Master dye and leave no Executor or Administrator fit to keepe an apprentice or able to place him: Hee shall bee provided for in the parish where hee was apprentice or shall bee sent backe to the parish from whence hee was put out?

Resol. Servants and apprentizes are by law settled in that parish, and if they become impotent there, the parish must abide the adventure,

ture after their terme or time of service be lawfully ended.

26. Qu. What is accompted a lawfull setling in a parish, and what not?

Resol. This is too generall a question to receive a perfect answer to every particular case which may happen: but generally this is to be observed, that the law unsettleth none who are lawfully settled; nor, permits it to be done by practice, or compulsion, and every one who is settled is a native householder, sojourner, an apprentice or servant for a month at the least, without a just complaint made to remove him or her, shall be held to be settled.

27. Qu. A rogue is taken at C. and will not confesse the place of his birth: neyther doth it appeare otherwise but that he confesseth the last place of his habitation to be at S. hereupon he is whipped and sent to S. at his coming to S. the place of his birth is there knowne by some to be at W. and thereupon the rogue confesseth it to be so: whether hee might without any new vagrancy be sent to W?

Resol. In this case it is fit to send such a rogue to the place of his birth: for this is but a mistaking and no legal settling.

28. Qu. If an Indictment be preferred to the grand jury of the quarter Sessions of the peace against one for murther, manslaughter, for robbery, felony, or Petilarcy, and ignoramus found thereupon, whether the said Sessions may deliver the party by Proclamation or not? *Resol.*

Resol. Not by Proclamation at all, but for petty Laceny, and other petty Felonies; in discretion the Goale may bee delivered of them.

29. Qu. If a Constable be chosen and refuseth to take his Oath, what shall bee done, and whether a Constable may make a deputy, and by what meanes?

Resol. The refusall or neglect to take oath in such a case is a contempt worthy of punishment, and thereupon to fine, and imprison him, and the making of a deputy is rather by toleration, then by law.

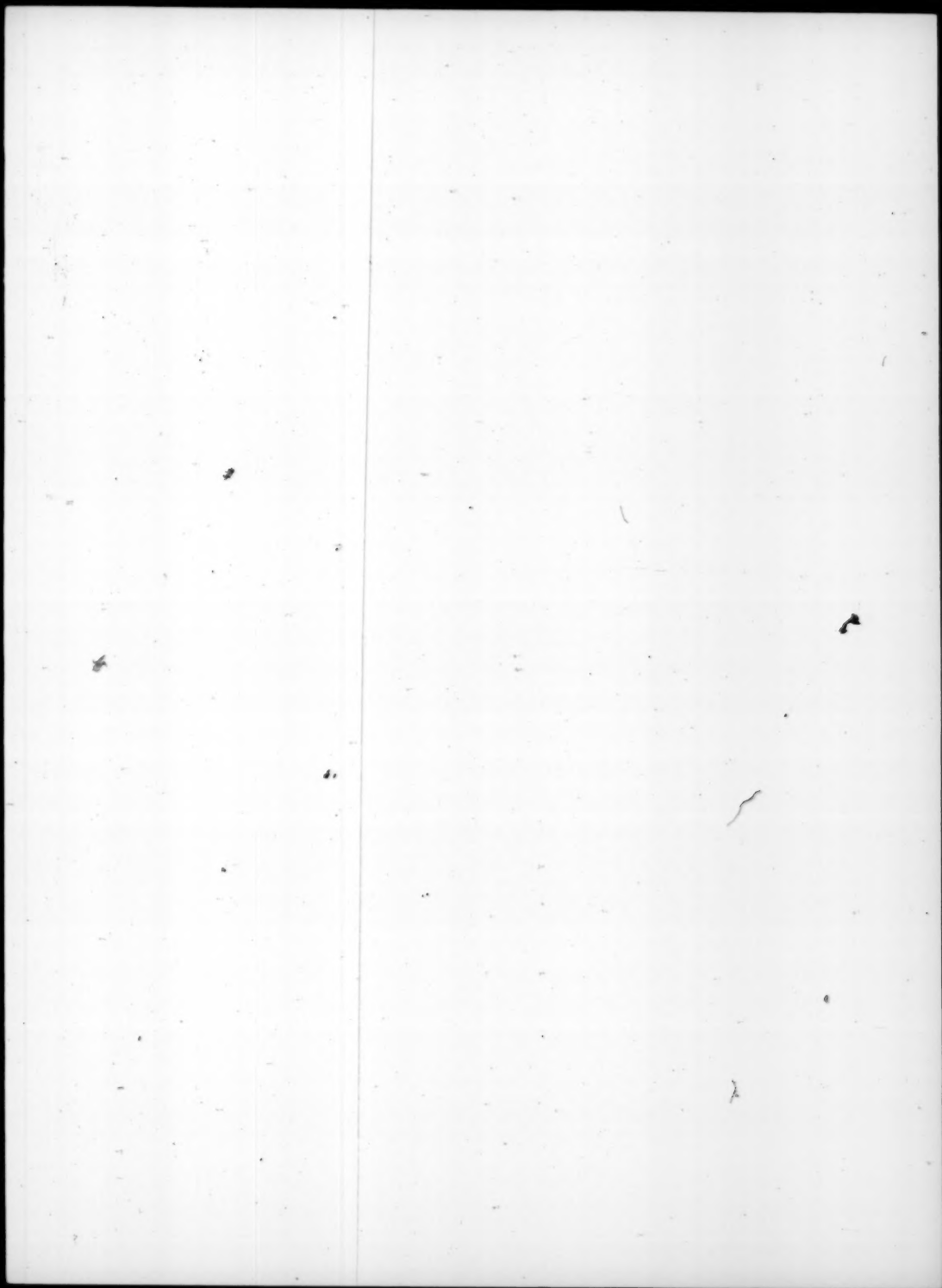
30. Qu. If a Constable dye or remoove out of the Parish where, &c. how is his place to be supplied?

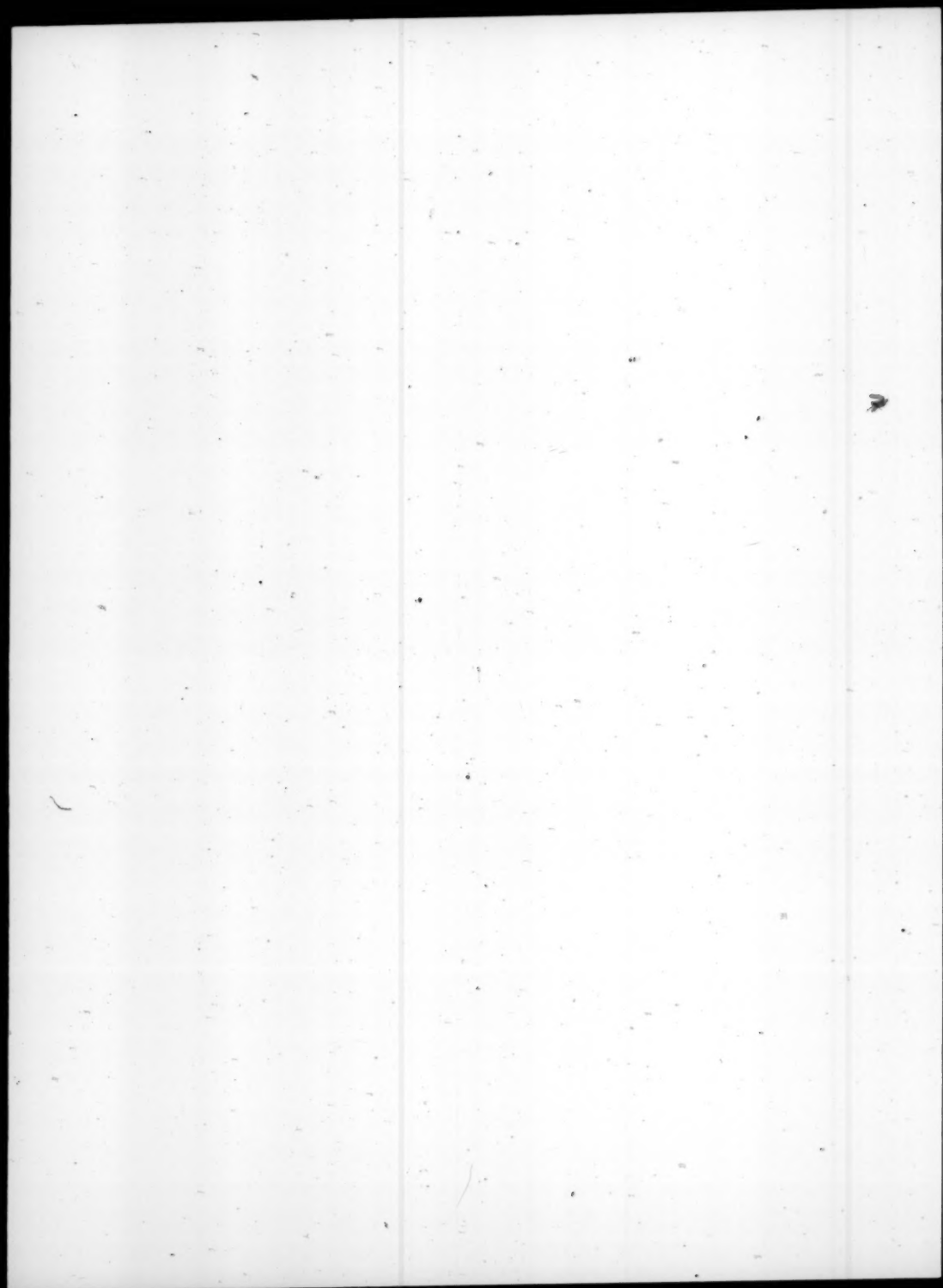
Resol. By the Lord of the Leete, if that time fall neere, otherwise by the Sessions; but if that bee too farre off, then by the next Iustices.

31. Qu. If a poore weake man be chosen Constable or Tythingman, and be unfit for the place how may he be remooved, and a fit man sworne in his roome?

Resol. The Iustices of Peace must helpe this, and if the Lord of the Leete have power to choose a Constable or Tythingman and performe so ill, it is a just cause to seize his liberty.

32. Qu. If a Nurse-childe, a Scholler at a Grammar-school, or in the Vniversity proove
to





to be impotent by Sicknesse, lamenesse, lunacy, or discovery of Ideocy, &c. how such persons shall be disposed?

Resol. A Nurse-child, or a Scholler at the Grammar-schoole, or at the Vniversity, or persons sent to the Common gaole, Hospitall, or houses of Correction, are not to be esteemed as persons to be settled there, more then Travai-lers in their Innes, but their settling is where their Parents are settled; and Children borne in common Gaoles, and Houses of correction, their parents being prisoners, are to be maintained at the charge of the County.

33. Qu. What proportion Parsonages, or Tithes shall beare to the taxation of the poore of the Parish?

Resol. The Parson or Vicar presentative, shall according to the reasonable value of his Parsonage, having consideration to the just deductions.

34. Qu. Whether for placing the poore of the parish, not to be removed by consent of the parish, these poore men may not bee placed as Inmates for a time?

Resol. They may by expresse words of the Statute of the 43. of Elizabeth.

35. Qu. If a parishioner or owner within a parish do bring into the parish without the consent of the parish, a stranger of another parish, which is, or apparantly is like to bee burthen-some unto the parish, how they may ease them-

Resol. By taxing such a one to the charge of the rates of the poore, not onely having respect to his ability or the land he occupyes, but according to the dammage and danger he bringeth to the parish by his folly.

36. *Qu.* For warding in the day-time, for apprehending of Rogues, whether the Constable may not enlarge it to a farther time?

Resol. Warding in the day-time is of great use, and must bee left to the discretion of the Constables or direction of the Iustices to vary according to the occasion.

37. *Qu.* Whether Alehouses ought to be allowed only in thorow-fare Townes, and others in other places to be restrained onely to sell to the poore out of doores.

Resol. The Iustices shall doe very well to allow none but in places very fit for their scituation and uses, and to moderate the number.

38. *Qu.* A man for his quality otherwise fit to be a Constable, or of other Office of that nature, procures himselfe to be the Kings servant extraordinary; and by that meanes would excuse himselfe to serve in the Country?

Resol. A servant extraordinary may well performe his ordinary service in the Country according to his quality.



*The Iustices opinion touching the Commissions by
which the Iustices sit at Newgate.*



HE Iustices at Newgate sit by
vertue of two Commissions (*viz.*)
Gaole delivery, and Oyer and de-
terminer.

By the Commission of Gaole
delivery they may try all prisoners in the Gaole
or by Bayle, or such as be indicted will render
themselves, generally for all Felonies : and al-
so for such other offences as are particularly as-
signed to them by Statute.

The Statute of 4 *Elizabeth*, 3 *cap.* 2. doth
give them power to receive Indictments a-
gainst Prisoners or such as are upon bayle, and
to proceede to try the same (*viz.*) Indictments
taken before the Iustices of the peace, and
by equity thereof all Indictments before coro-
ners, 3. *Mar. Bro. Commission. omnium.* 24. saith,
That the Commission is *ad deliberand. Gaol. de*
prison. in eisdem existen. But they cannot take
Indictments as Iustices of Gaole delivery, but
being Iustices of the peace, they may take In-
dictments against prisoners, but not against
them that bee at large, for as much as power

Anciently fe-
lonies inclu-
ded all tref-
passes, there-
fore the Iusti-
ces of Gaole
delivery have
power to hold
plea of tref-
passes against
them in pri-
son or upon
bayle to ren-
der them-
selves.

v. 1. *Mar. Dyer*
99. Iustices of
Gaole delive-
ry hold pleas
of all appeales
of felony or
murder a-
gainst one in
prison by their
general Com.
and of ap-
peales : so by
the same rea-
son to take
Indictments.

is given them, consequently they must have meanes to doe so, which is by Indictments, *Id quarend.*

Howsoever it is cleere, that they may enquire of many offences and take Indictments in such cases where power by the Statute is given to the Iustices of Gaole delivery, in such cases where they have authority by Law or Statute there the title of Indictments is, that *Ad gaolam deliberationem tent.* before the Commissioners of Gaole delivery, *I.S.* was indicted, and the record must be made up so.

And whereas by the Statute of 4. *Eliza.* 3. cap. 2. Indictments taken before Iustices of peace of Coroners, or any other against any Prisoners, then the entry of the Indictments is returned taken, *Memorand. quod ad generalem Sessionem tent.* before *A. B. C.* Iustices *ad pacem in Com. Middlesex* or *London*, *I.S.* was indicted, and then tryed before Iustices of Gaole delivery, and by vertue of the said Statute, Indictments taken before Iustices of the Peace of *London* or *Middlesex*, are tryed before the Iustices of Gaole delivery.

The Commissioners of Oyer and Terminer is *Ad triand. inquirend. audiend. & determinand.* They may enquire of all offences mentioned in the Commission, albeit the offenders bee at large, but they cannot try prisoners upon Indictments taken before any other then themselves, as the Iustices of Gaole delivery may by the

the aforeſayd Statute, unleſſe there be a ſpecial
all Commiſſion made, as it was in the caſe of the
Earle of Leiceſter, mentioned in *Flow. Cam.* for
the ordinary Commiſſion of Oyer, and termi-
ner is *ad inquirend. audiend. & determinand.*
therefore they cannot determine of things un-
leſſe they made enquiry firſt, and on the other
ſide alſo the Juſtices of Gaole delivery may try
Indictments taken before Juſtices of the peace,
yet if one indicted before Commiſſioners of
Oyer and Terminer, the Juſtices of Gaole de-
livery cannot try the ſame, becauſe the Record
of the Commiſſion of Oyer and Terminer are
to be returned in the Kings Bench, 44. E. 13.

3. Mar.
Bro. Com.
24.

The Commiſſion and the Records of the
proceedings before the Juſtices of Gaole deli-
very, are to be returned to the Cuſtos Rotulorum
of the County, when the ſame perſons are Ju-
ſtices of Gaole delivery, and of Oyer and Ter-
miner, they may ſit the ſame day and place, and
enquire by the ſame Iurie, but the entry of the
Records muſt be ſeverall, according as the In-
dictment is.

At the Aſſiſes in the Countrey, the Juſtices
have their ſeverall power as the Juſtices of
Gaole delivery, Oyer and Terminer, and Juſti-
ces of peace.

But when the Records are made up, they
muſt be according to the power they made the
ſame to proceed upon.

This is the regular and legal course. But the Clerkes of the Assizes promiscuously make entry thereof; But if a Writ of Error bee brought, they must certifie according to Law, or else it will be erroneous, and so upon a *Certiorari*.

The Sessions of *London* may bee begun at the Guild-hall, and then adjourned to Newgate, If some Indictments bee at Guild-hall, then those must bee so certified: if others at Newgate; then the adjournment must bee mentioned, and that the Indictment was then taken.

Note that the tryall of Indictments taken before Iustices of the peace of *London*, cannot be tryed at Newgate, as in nature of a tryall before Iustices of the peace at *London*, for many of the Commissioners, for Gaole delivery, are not Iustices of the peace for *London*, but in such cases the tryall must be before the Iustices of Gaole delivery: as upon Indictments taken before the Iustices of the peace of *London*; as in the case of Indictments taken before the Iustices of the peace of *Middlesex*.

But if Indictments at Newgate be originally taken before them, as Iustices of Gaole delivery, then it is inquirable how the Jury sworne, and impannelled, to enquire at the Sessions of the Peace for *London*, or *Middlesex*, doe serve to present Indictments before the

the Iustices of Gaole delivery at Newgate, un-
lesse the custome and usage will warrant, the
two severall Iuries, sworne at the Sessions of
the peace for *London* or *Middlesex*, are also by
the same oath and impannelling to serve for the
grand Iury for the Commission of Gaole deli-
very, and Oyer, and Terminer.

Vpon conference with Mr. *Keeling*, and
the Clerkes for Newgate of *London*, and
Middlesex, and the Clerkes of Assizes, and
view of the severall Entries, a more mature
and certaine resolution may bee given, this
being in haste, and without such considerati-
ons as were requisite.

Ff N IS.

E. L. L. B.